IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT

CMI, INC. OF KENTUCKY,

Petitioner,

vs.

JOHN C. FABIAN, ET AL.,
CATHERINE MARSH,
MORLEY PARENT,
SARA PENNEY,
KENNETH BAKER, ET AL.,
and THE STATE OF FLORIDA,

Respondents.

_______________________/

Case No. ____________________

Circuit Appeal Case Nos:
2007 AP 010721 NC
2007 AP 010932 NC
2007 AP 010934 NC
2007 AP 010933 NC
2007 AP 012538 NC

County Case Nos:
2006 CT 009733 NC
2005 CT 016113 NC
2003 MM 008714 NC
2003 CT 018637 NC
2005 MM 002364 NC

PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 9.100, Non-Party CMI, Inc., d/b/a CMI, Inc. of Kentucky (hereinafter "Petitioner"), having filed a limited notice of appearance in the underlying matters both reserving and contesting jurisdiction, respectfully petitions this Court for a Writ of Certiorari to review the Opinion dated March 31, 2008 and Mandate dated April 15, 2008, of the Circuit Court, such Order affirming the consolidated orders of the County Court regarding their Orders of Contempt, and shows the Court as follows:

JURISDICTION

This Court has jurisdiction to issue a Writ of Certiorari under Rule 9.030(b)(2) of the Florida Rules of Appellate Procedure.

STATEMENT OF THE FACTS

Petitioner is a Kentucky corporation that has filed a limited notice of appearance reserving and contesting jurisdiction for purposes of this appeal, whose contacts with the State of Florida involve the manufacture and sale of Intoxilyzer brand breathalyzers, models 5000 and 8000, to the Florida Department of Law Enforcement ("FDLE"). This Petition, like the appeal in the Circuit Court below, expressly contests the jurisdiction of the Florida courts over Petitioner because Petitioner is a non-party out-of-state discovery witness.

Over the past several years, Respondents attempted to obtain the confidential and proprietary source code to these breathalyzer instruments through Florida Statute 316.1932(1)(f)4, which codifies the regulation of the DUI breath testing program. Recently, the Florida Legislature amended this statute to reflect that the "full information" clause in the statute does not include the source code to the breathalyzers, and criminal defendants are not entitled to the source code. Fla. Stat. 316.1932 (2006).

After the Florida Legislature stated Respondents are not entitled to the source code from the State or Petitioner through 316.1932(1)(f)4, and the Florida Legislature closed the "full information" loophole, Respondents sought the exact same information by requesting subpoenas duces tecum directly to the out-of-state manufacturer of the breathalyzer, Petitioner, under another avenue, Fla.R.Crim.Pro. 3.220(f). (*Fabian* Vol. 1, p.3).

Fla.R.Crim.Pro. 3.220(f) provides that the court, upon a showing of materiality, may require such other discovery as the parties or justice require. Based upon this additional discovery rule, all three Sarasota County Courts found that the source code is material, and directed the clerk to issue discovery subpoenas directly to Petitioner through its Florida registered agent. (*Fabian* Vol. 1 p.48) (*Baker* p. 2-5) (*Marsh, Parent, Penney* p. 2-3). The case law cited by the County Courts for authority to issue a discovery subpoena duces tecum directly to a non-party out-of-state corporation through a registered agent is *General Motors Corp. v. State,* 357 So.2d 1045 (Fla. 3DCA 1978). (*Baker* p. 4).

The subpoenas were thus issued, but prior to the production date noted on the subpoenas, Petitioner obtained orders from the Kentucky courts wherein they reside quashing these subpoenas because they did not comport with the Uniform Act for production of out of state witnesses. (*Fabian* Vol. 1, p. 131, 165). Respondents' attorney was noticed by letter that the subpoenas had been

quashed. (*Fabian* Vol. 1, p. 128-140). Respondents then informed the County Court Petitioner had quashed the subpoenas. (*Fabian* Vol. 1, p. 128-140). Respondents subsequently moved for and obtained orders from each of the County Courts finding Petitioner in contempt despite the County Courts' awareness that Petitioner had already quashed the subpoenas and that Petitioner did in fact respond to the subpoenas by way of letter of objection to opposing counsel and motion to quash in Kentucky. (*Fabian* Vol. 1, p. 184) (*Baker* p.51) (*Marsh, Parent, Penney* p. 29).

Petitioner appealed these Orders of Contempt to the Circuit Court, contesting both the jurisdiction of the County Court over Petitioner and the willfulness of the failure to respond to the subpoenas. The Circuit Court affirmed the County Court Orders. (Appendix C, page 133).

To date the daily compounding fines ($3,200 per day in *Fabian* and $2,900 per day in *Baker*) from the contempt orders have reached over $750,000.00 and the County Court refuses to stay them pending this appeal.

THE NATURE OF THE RELIEF SOUGHT

The nature of the relief sought by this Petition is a Writ of Certiorari, ruling that the Circuit Court departed from the essential requirements of the law by

affirming the County Court Orders of Contempt, such ruling causing Petitioner irreparable harm by way of hundreds of thousands of dollars in fines.

SUMMARY OF ARGUMENT

The County Court Orders of Civil Contempt should be reversed on four grounds. First, the County Courts erred when they determined the source code was "material" under Fla.R.Crim.Pro. 3.220(f) because the Florida legislature amended the DUI statute with the intent to preclude Respondents from obtaining the source code, even from the manufacturer. Second, the court erred because Florida courts do not have subpoena jurisdiction over a non-party out-of-state witness. Third, Petitioner did not "willfully" fail to respond to the County Court's subpoenas duces tecum because Petitioner did properly responded to the subpoenas, quashed them in Kentucky, and was in fact **ordered** by its own court in Kentucky not to respond to the subpoenas. Fourth, when Petitioner asserted a trade secret privilege for the source code, the County Court was obligated, since it had already found the source code to be a trade secret, to provide appropriate protective measures to protect that trade secret prior to ordering its production.

<u>ARGUMENT</u>

I. THE COUNTY COURT ERRED WHEN IT FOUND THE SOURCE CODE "MATERIAL."

In the present case, Respondents attempted to obtain the source code to the Intoxilyzer 5000 and 8000 by way of Fla.R.Crim.Pro. 3.220(f). Rule 3.220(f) provides that the court, upon a showing of materiality, may require such other discovery as the parties or justice require. Throughout the State of Florida, upon motion by criminal defendants and in nearly every jurisdiction, trial courts held evidentiary hearings to determine whether the source code was "material" under this rule of discovery. Virtually all found the source code was not material to Respondents presentation of their defense. The three Sarasota County Court divisions are one of a scant few jurisdictions that have determined the source code is material.

A. THE DEFINITION OF MATERIALITY

The best and most often cited definition of "materiality" comes from the Florida Supreme Court case of *James v. State*, 453 So.2d 786 (Fla. 1984). In *James*, the Florida Supreme Court considered materiality under Fla.R.Crim.Pro. 3.220(a)(2), which requires the State to disclose any material information tending to negate the guilt of the accused. *James* cited the explanation of the United States Supreme Court: "The mere possibility that an item of undisclosed information

might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *James* at 789 citing *U.S. v. Agurs*, 427 U.S. 97, 96 (1976). The Sarasota Circuit Court has utilized this very standard to determine "materiality" in its Order Denying Motion For Issuance of Subpoena Duces Tecum dated October 31, 2006 in *State v. Jugov*, Criminal Case No. 2005 CF 011805 NC citing *State v. Bastos*, et al, 13 Fla. L. Weekly Supp. 1003a (June 27, 2006).

Here, Respondents failed to show in the hearing on materiality that the source code might have helped their defense, affected the outcome of the trial, or that there any irregularities with any of these named defendants. Thus, according to *James*, the Respondents have not shown the source code was material. In fact, Respondents own attorney noted in argument at the hearing on materiality that their request for the source code may be a fishing expedition. Respondents' attorney stated "I imagine the State is going to say that we're on a fishing expedition. Maybe we are. But a fishing expedition is proper when trying to figure out what is relevant when it comes to discovery." (*Fabian*, page 474).

This type of fishing expedition is exactly what *James* was referring to. The mere possibility that documents are relevant does not make them material.

B. THE FLORIDA LEGISLATURE NEVER INTENDED THE SOURCE CODE TO BE MATERIAL

As Petitioner has noted, after Respondents and other similarly situated criminal defendants repeatedly attempted to obtain the source code through the full information statute, the Florida Legislature became fed up with the way county courts throughout the State were handling the issue, and proactively amended 316.1932(1)(f)4 to reflect that the "full information" clause in the statute does **not** include the source code to the breathalyzers, and criminal defendants are **not** entitled to it.

F.S. 316.1932(4) was recently amended in 2006 to state:

> "full information does not include manuals, schematics, or software of the instrument used to test the person or any other material that is not in the actual possession of the state. **Additionally, full information does not include information in the possession of the manufacturer of the test instrument."**

Petitioner is that manufacturer. Therefore, the Florida Legislature has expressly stated that Respondents are not entitled to the source code to the Intoxilyzer from the State or the manufacturer. Logically then, the source code cannot be material to Respondents' case. Additionally, the Fourth District Court of Appeals held just last year that a criminal defendant is "not entitled to the manufacturer's proprietary source code information for the Intoxilyzer 5000." *Pflieger v. State*, 952 So.2d 1251, 1254 (Fla. 4DCA 2007).

Based upon case law and the clear intent of the Florida Legislature to preclude Respondents from obtaining the source code, the lower court erred when it found the source code was material, and such ruling should be overturned.

II. THE "UNIFORM ACT" MUST BE UTILIZED TO SUBPOENA AN OUT-OF-STATE NON-PARTY

A. THE UNIFORM ACT

The County Court did not have jurisdiction to issue the discovery subpoenas duces tecum to Petitioner because Petitioner is an out-of-state non-party. The County Court must utilize the Uniform Act to issue discovery subpoenas duces tecum to an out-of-state non-party. Respondents have argued that *General Motors Corp. v. State*, 357 So.2d 1045 (Fla. 3DCA 1978), provides authority to issue subpoenas duces tecum without utilizing the Uniform Act to an out-of-state non-party as long as there is an in-state resident agent. This statement is incorrect because *General Motors* is no longer good law.

The "Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings," codified at Sections 942.01 through .06, Florida Statutes (2007), was enacted in 1941 along with identical statutes from virtually every other state in the nation. At the time, the legislatures recognized a need to facilitate the administration of the criminal law by providing some

statutory authority for securing the attendance of a witness from outside the state in which the criminal proceeding is pending.

Section 3 of the statute is entitled "Witness from another state summoned to testify in this state." Section 3 provides in pertinent part that:

> "If a person in any state ... is a material witness in a prosecution pending in a court of record in this state ... a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. Said certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his or her attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found." Fla. Stat. § 942.03 (2007).

Section 5 of the statute concerns uniformity of interpretation throughout the United States, and provides that:

> "This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it, and shall be only applicable to such state as shall enact reciprocal powers to this state relative to the matter of securing attendance of witnesses as herein provided." Fla. Stat. § 942.05.

Early in this statute's history, there was confusion over whether Chapter 942 applied to subpoenas duces tecum. During this period of conflict, the case of *General Motors* was decided. *General Motors Corp. v. State*, 357 So.2d 1045 (Fla. 3DCA 1978). *General Motors* ruled the Uniform Act does not apply to subpoenas duces tecum. As a result, Respondents now claim an ordinary discovery subpoena duces tecum sent directly to Petitioner's resident agent is permissible.

B. *GENERAL MOTORS v. STATE*

Both Respondents and the County Court rely upon *General Motors* for authority to issue a discovery subpoena to an out-of-state non-party by way of registered agent. A closer examination shows that *General Motors* stands for two separate and distinct holdings: (1) that a grand jury subpoena duces tecum issued by the State Attorney's Office under Section 27.04, Florida Statues, could reach documents held by a non-resident entity under the Florida long arm statute; and (2) that the Uniform Act is inapplicable in subpoenas duces tecum for production of documents. *General Motors Corporation,* 357 So.2d at 1046, 48.

First, the subpoena duces tecum at issue in *General Motors* was a grand jury subpoena issued by the State Attorney's Office under that office's plenary discovery authority used by the State in criminal investigations. The subpoenas duces tecum issued in the County Court giving rise to the instant appeal were discovery subpoenas issued by the Respondents. As such, the *General Motors* subpoena was issued under significantly broader statutory authority than that which is available to a criminal defendant in a misdemeanor trial. *See e.g. State v. Investigation*, 802 So.2d 1141, 1143-1144 (Fla. 2DCA 2001) ("As an initial matter, the State does have the authority to issue an investigative subpoena duces tecum. The courts of this state have repeatedly held that the state attorney acts as a one-person grand jury in carrying out investigations into noncapital criminal conduct, and the state

attorney must be granted reasonable latitude in that role.") Furthermore, the State is not required to show materiality or relevance when issuing an investigatory subpoena. *Id.* at 1144. The subpoena issued in this case was not an investigatory subpoena, but rather a subpoena duces tecum pursuant to a discovery request where the criminal defendant must show both relevance and materiality.

Therefore, in stark contrast to the broad statutory authority under which the State Attorney's Office was acting in *General Motors,* Respondents' ability to issue a subpoena duces tecum is extremely limited. The *General Motors* court was evaluating the reach of a subpoena of an entirely different nature – issued pursuant to different statutory authority and with a broader level of authority – than the one before this Court. As a matter of public policy, the restrictions upon criminal defendants with respect to issuance of subpoenas duces tecum are limited due to the high potential for abuse; exactly the situation Petitioner finds itself in now. As such, *General Motors* does not support issuance of this subpoena on Petitioner.

General Motors is further distinguishable from the instant case as to the number of, and level of, contacts that the target of the subpoena had with Florida. In that case, not only did General Motors have employees, offices and substantial property in Florida, but the company stored a number of the documents sought by the grand jury subpoena within the State of Florida. *See General Motors Corporation,* 357 So.2d at 1047-47. By contrast, Petitioner has no employees,

offices or property in the State. Nor does Petitioner have any documents in this jurisdiction, including the source code. In addition, it is noteworthy that Petitioner's registered agent for service of process is merely an appointed agent, and does not have any company specific knowledge or possession of documents sought by Respondents in this case.

General Motors also held the Uniform Act is inapplicable to subpoenas duces tecum for production of documents. *Id.* at 1148. In addition to being plainly distinguishable from the instant case as noted above, on the issue of whether the Uniform Act is applicable to subpoenas duces tecum, the *General Motors* case is no longer good law.

First, the conflict that existed on this issue in 1978 has been resolved. The sole case that *General Motors* relied upon, *In Re Grothe*, 59 Ill. App.2d 1 (1965), was legislatively overruled by Illinois statute the very year it came out. *See* 1965 Ill. laws at 2694 Section 1, effective August 6, 1965. **No other known case in the entire nation supports the *General Motors* position and *General Motors* itself has never been cited by any appellate court.** However, there is more recent Florida case law that has held the Uniform Act does apply to subpoenas duces tecum. *Delit v. State*, 583 So.2d 1083, 1085-1086 (Fla. 4DCA 1991).

In *Delit*, the Fourth DCA squarely addressed the Uniform Act where an out-of-state court had presented a certificate for subpoena duces tecum under the

Act. On appeal, one of the State's arguments had been that the trial court erred when it ruled the Uniform Act did not apply to subpoenas duces tecum. *Delit* found no Florida cases on point, but noted that "Courts of other states seem uniformly to hold that the Act permits issuance of subpoenas duces tecum." *Id.* at 1085. In its decision, *Delit* recognized that because Fla. Stat. § 942.05 mandates the Uniform Act is to be interpreted and construed as to effectuate its general purpose and make uniform the law of the states which enact it, the "uniform holdings of our sister states should be given great weight where they are well reasoned and legally sound." *Id.* at 1086. *Delit* thus held that the Uniform Act applies to subpoenas duces tecum. Since *Delit* was decided in 1991, it is clear the Third DCA case of *General Motors* from 1978 is no longer controlling law.

More recently, the Circuit Court in Seminole County held evidentiary hearings on the source code. In *State v. Kocis*, Judge Donna McIntosh discussed the Uniform Act and *General Motors* with regard to issuance of a subpoena duces tecum to CMI, and noted that "there existed a conflict of opinion regarding the applicability of the Uniform Law to a request for production of documents… [h]owever, since then, the conflict has largely been resolved contrary to the position adopted in *General Motors*." (*Fabian* Vol.1, p.148) *State v. Kocis*, Criminal Case No. 05-2284-CFA (Seminole Circuit Court), <u>Order Denying Defendant's Motion for Leave of Court to Issue Subpoena Duces Tecum</u> dated

January 11, 2007; See also *Mastrapa v. South Florida Money Laundering Strike Force*, 928 So.2d 421 (Fla. 3DCA 2006). "Implicit in the *Mastrapa* opinion is the recognition that the Uniform Law does apply to subpoenas duces tecum." *State v. Kocis,* Order Denying Defendant's Motion for Leave of Court to Issue Subpoena Duces Tecum dated January 11, 2007, paragraph 5.

C. THE CONCEPTS OF PERSONAL JURISDICTION AND SUBPOENA POWER ARE ENTIRELY DIFFERENT

The *General Motors* case cites no direct authority to support its use of Florida's long arm jurisdiction to obtain subpoena power over a non-party to a criminal proceeding – especially an out-of-state, non-party corporation. In resolving this issue, a critical distinction must be made between personal jurisdiction and the exercise of subpoena power.

Without compliance under the Uniform Act, the subpoena power of the state over a witness in a criminal case ends at that state's borders. See *Minder v. Georgia*, 183 U.S. 559 (1902). In fact, the Uniform Act addressed the jurisdictional problem encountered in *Minder*. *Silverman v. Berkson*, 661 A.ed 1266 (N.J. 1995) (problem of *Minder* addressed by the Uniform Act).

The state supreme courts that have considered these issues have uniformly concluded that the exercise of personal jurisdiction and the exercise of subpoena

power are distinct powers. Therefore, the act of designating an agent for service of process – typically required under law to do business in a state – is not sufficient to assert subpoena power over a non-resident, non-party corporation. See *Syngenta Crop Protection, Inc. v. Monsanto Company,* 908 So.2d 121, 129 (Miss. 2005) ("In sum, we hold that a Mississippi court cannot subpoena a nonresident nonparty to appear and/or produce in Mississippi documents which are located outside the State of Mississippi, even if that nonresident nonparty is subject in another context to the personal jurisdiction of the court."); *Phillips Petroleum Co. v. OKC Limited Partnership,* 634 So.2d 1186, 1187-88 (La. 1994) ("The concepts, and/or underlying purposes, of personal jurisdiction and subpoena power are simply different;" "Whereas the long-arm statute extends Louisiana's personal jurisdiction over persons or legal entities beyond Louisiana's borders, there is no similar authority for extending the subpoena power of a Louisiana court beyond state lines to command in-state attendance of non-resident nonparty witnesses."); *In re: National Contract Poultry Growers' Association,* 771 So.2d 466, 469, 470 (Ala. 2000) (Overturning the trial court's decision to hold a non-party, out-of-state corporation in contempt for failure to comply with a subpoena on grounds that such a subpoena had to be issued and served under the target corporation's state's law, not under the law of Alabama).

In *National Contract Poultry Growers' Association*, The Alabama Supreme Court further commented:

> The fact that NCPGA may have sufficient contacts with the State of Alabama to subject it to the jurisdiction of the Alabama Courts under the Alabama long-arm personal-jurisdiction provisions is irrelevant to the question presented in this case ... a finding that NCPGA is subject to the personal jurisdiction of Alabama courts would not necessarily mean that it was obligated to respond to a subpoena by having to appear and produce documents in an Alabama court in a lawsuit to which it is not a party. The underlying concepts of personal jurisdiction and subpoena power are entirely different.
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> *Id* at 469.

In addition to this unequivocal state authority, the United States Court of Appeals for the Eleventh Circuit and the United States Court of Appeals for the Fifth Circuit, along with other federal courts to address this issue, support the proposition that a statutory agent of process will not provide a basis for exercise of subpoena power over a non-party, non-resident corporation. See *Ariel v. Jones*, 693 F.2d 1058, 1061 (11th Cir. 1982) (holding that the district court did not abuse its discretion in quashing a subpoena to a non-resident non-party despite the presence of a statutory agent for service of process within the district); *Natural Gas Pipeline Co. of America v. Energy Gathering, Inc.*, 2 F.3d 1397, 1406 (5th Cir. 1993) ("We agree with Fox that a federal court sitting in one district cannot issue a subpoena duces tecum to a non-party for the production of documents located in another district.").

The Eleventh Circuit case in *Jones, supra,* is instructive. The question in that case was whether a party in an action in the Middle District of Florida could obtain documents from a non-party corporation with a designated agent for service of process in the Southern District of Florida in Miami. The Court upheld the district court's decision to quash the subpoena and focused the inquiry on the "degree of control" exercised by the designated agent of process over the subpoenaed documents. *Id.* at 1060. The Court stated as follows:

> A corporation may not realistically be considered fungible everywhere it does business. Therefore, even positing that this court has personal jurisdiction..., it is unreasonable to assume that these Petitioners' local offices "control" all documents kept at their respective corporate headquarters. In the absence of such control, therefore, even the existence of personal jurisdiction in this court is insufficient to create jurisdiction over the documents where they are outside of the district.
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> *Id.* at 1060-61 (quoting *In Re North American Acceptance Corp.,* 21 F.R.Serv.2d 612 (N.D.Ga. 1975)).

Applying this authority to the instant case, Petitioner's statutory agent for service of process does not exercise any control over, and does not possess, the Intoxilyzer 5000/8000 source code. Therefore, the mere presence of Petitioner's statutory agent in Florida provides no grounds for issuance and service of a subpoena on Petitioner as a non-resident, non-party to compel production of documents in this Florida proceeding under the Florida long-arm statute. To the extent Respondents have the authority to obtain the source code through issuance

of a subpoena duces tecum, that authority lies exclusively within the scope and under the authority of the Uniform Act, and not pursuant the Florida Rules of Criminal Procedure and the *General Motors* case.

Since the Uniform Act provides in section 5 that it intends to make uniform the laws of the states which enact it, the Uniform Act not only sets forth a procedure by which Florida citizens may obtain testimony and documents from citizens of other states in the criminal context but also dictates that Florida courts interpret the Uniform Act to be uniform with such similar laws enacted in each of the signatory states. According to the dictates of the Uniform Act, therefore, the decisions of the Florida courts under the Act should be informed by other signatory states', including Kentucky's, interpretations and decisions under the Uniform Act.

The Kentucky District Courts wherein CMI resides have addressed this issue repeatedly in response to subpoenas from Sarasota, Charlotte and Manatee Counties. *See* Order Quashing Subpoena Duces Tecum, *In Re: Subpoena Duces Tecum (State of Florida v. Jack Irish, et al., 2006 CT002109 SC)* (Ky. D.Ct. April 25, 2006); Order Quashing Subpoena Duces Tecum, *In Re: Subpoena Duces Tecum (State of Florida v. Mary Bastos, 2006 CT413969-X)* (Ky. D.Ct. May 11, 2006).

By failing to require Respondents to subpoena the source code under the Uniform Act, the County Court is undermining the expressly stated purposes of the Uniform Act and is operating without jurisdiction and contrary to law. If the State of Florida expects other jurisdictions to follow the rules of the Uniform Act – and expects other states to respect the sovereign power of this State over its own corporations – the State of Florida must respect the procedures established under that Act which safeguard every signatory states' citizens from overreaching and unlawful service of process.

III. CMI'S "LACK" OF RESPONSE TO SUBPOENAS DUCES TECUM WAS NOT A WILLFUL VIOLATION

In the Orders of Civil Contempt directed towards Petitioner, the County Courts have characterized Petitioner's election not to appear before them as a "willful" failure to comply with the court's subpoenas, despite having been provided documentation from counsel for Respondents that Petitioner had already obtained orders from the Daviess District Court in and for the Commonwealth of Kentucky quashing the very subpoenas at issue.

Petitioner's decision not to respond to these subpoenas relied, in part, upon the Daviess Court's holding that Respondents were required to follow the requirements of the Uniform Act in order to obtain production of the source code from Petitioner. The Uniform Act is universally recognized throughout the United

States, except for Sarasota County Court, as the correct way to secure the appearance of non-party out-of-state persons or documents by way of discovery subpoena.

Petitioner additionally relied upon the Order on Defendant's Motion To Compel Production of the Source Code in *State v. Irish* (Criminal Case No. 2006 CT 2109 SC) dated May 4, 2006, wherein Judge Denkin noted in Footnote 22:

> This court also declines to accept defendant's argument that CMI, Inc. was properly served with a subpoena duces tecum and willfully refused to provide the source code. This court finds that CMI, Inc. must be served pursuant to section 942.01, Fla. Stat. (2005) and adopts the ruling announced [the Daviess Court].

Thus, even the very court that has held Petitioner in contempt *(Marsh, Parent, Penney)* told Petitioner in no uncertain terms the Uniform Act must be followed.

Finally, in a sister case arising from Charlotte County, Petitioner was specifically ordered by the Kentucky Daviess Court not to respond to subpoenas out of the State of Florida not comporting with the Uniform Act. *State v. Adkins*, (KY Sixth Judicial District Court Case # 06-C-01500) ("In addition to denying Defendant's motion for a subpoena, the Court also ordered CMI to refuse to honor any subpoena directed to it without proper certification.").

It is clear Petitioner has not **willfully** failed to comply with any orders of the County Court. "Willfulness" has been characterized as the "deliberate defiance" of a court order or a showing of bad faith. *Amerimark, Inc. v. Hutchinson*, 882 So. 2d

1114 (Fla. 1DCA 2004). Assuming *arguendo* the decision of Petitioner, a Kentucky corporation, to contest the propriety of a subpoena issued from the State of Florida in the jurisdiction wherein it resides was incorrect, such an action simply does not constitute a "deliberate defiance" of any orders issued by this Court or a showing of bad faith. Petitioner was led to believe from orders out of Sarasota County Courts[1], as well as courts from around Florida[2] and in Kentucky[3], and from decisions of all of Florida sister state's Supreme Courts, that the Uniform Act applied and, accordingly, Petitioner did not have to respond to the barrage of subpoenas issued out of Sarasota County, including the subpoenas issued in the instant cases giving rise to the instant appeal. Under the circumstances, the record fails to establish a willful violation on Petitioner's part of any court order.

Petitioner Did In Fact Properly Object To The Subpoenas Duces Tecum

Petitioner in fact properly objected to the subpoenas at issue. Therefore, Petitioner should not have been held in contempt. The subpoenas for all five of the consolidated cases can be found in the *Fabian* record. (*Fabian* Vol. 1, p.85, 86, 106) The plain language of all of these subpoenas states to Petitioner **"You have the right to object to the production pursuant to this subpoena at any time**

[1] *State v. Irish* (Criminal Case No. 2006 CT 2109 SC).
[2] *Delit v. State*, 583 So.2d 1083, 1085-1086 (Fla. 4DCA 1991).
[3] *State v. Adkins*, (KY Sixth Judicial District Court Case # 06-C-01500)

before production by giving written notice to the attorney whose name appears on the subpoena."

The subpoena itself tells the receiver, objection to the subpoena is **not to the court** but to the attorney whose name appears on the subpoena. The name of the attorney who appears on the subpoenas at issue is Robert Harrison, attorney for all of the consolidated Respondents. The production date for the subpoenas was April 18, 2007 for *Baker* (*Fabian* Vol. 1, p.85), and May 16, 2007 for *Fabian*, *Marsh*, *Parent* and *Penney*. (*Fabian* Vol. 1, p.86, 106) A motion objecting to the subpoenas and to quash them was filed in Kentucky Davies District Court on April 12, 2007. (*Fabian* Vol. 1, p.72) The attorney for the Respondents was specifically noticed and served with a copy of this objection and motion to quash on April 12, 2007, **prior to the production dates.** (*Fabian* Vol. 1, p.83) Therefore, the attorney named on the subpoenas was in fact provided written notice of objection to the production.[4]

Petitioner therefore could not have been held in contempt because they followed the exact instructions on the subpoena itself. Furthermore, as this Court can see by the letter dated May 14, 2007 from Robert Harrison to Petitioner, he was fully aware Petitioner objected to the production of the source code prior to the specified production date. (*Fabian* Vol. 1, p.124).

[4] Counsel for Appellee actually appeared in Kentucky through counsel in these proceedings and lost.

IV. THE SOURCE CODE IS A TRADE SECRET

In the written objection to Respondents noted above, Petitioner asserted that the subpoenaed source code was a trade secret. (*Fabian* Vol. 1, p.74, para. 7) ("The source code for the Intoxilyzer 5000 is a trade secret of CMI.")

Once Petitioner provided written notice to Respondents objecting to the subpoenas and informing them it was a trade secret, it was up to counsel for Respondents to provide this information to the lower court. Once Petitioner informed Respondents it objected to the subpoena, Florida Statute 90.506 entitled "Privilege With Respect To Trade Secrets" **must** be followed. Florida Statute 90.506 states in pertinent part, "When the court directs disclosure, it shall take the protective measures that the interests of the holder of the privilege, the interests of the parties, and the furtherance of justice require."

Pursuant to this statute, "When trade secret privilege is asserted as the basis for resisting production, the trial court must determine whether the requested production constitutes a trade secret; if so, the court must require the party seeking production to show **reasonable necessity** for the requested materials." *Rare Coin-it, Inc. v. I.J.E., Inc.*, 625 So.2d 1277, 1278 (Fla. 3DCA 1993) (emphasis added).

The lower court never held any hearing or discussed in any way this "reasonable necessity" standard or the fact that the source code was considered a

trade secret. The court never required Respondents to demonstrate reasonable necessity. Reasonable necessity is a much higher standard than materiality. Additionally, the lower court was **obligated** under 90.506 to take protective measures prior to considering production of a trade secret. This was never done, even though the lower court knew the requested information was a trade secret.

In the Sarasota County case of *Irish*, which held extensive evidentiary hearings on the source code issue, Judge Denkin noted that "both the State and the defense experts agree that the source code constitutes a trade secret." *State v. Jack Irish*, Criminal Case No. 2006 CT 02109 SC (Order on Defendant's Motion to Compel Production of the Source Code dated May 4, 2006).

Furthermore, the Fifth District Court of Appeals has held that "It is also without dispute that the code is a trade secret of CMI, Inc. and that CMI, Inc. has invoked its statutory and common law privileges protecting the code from disclosure." *Moe v. State*, 944 So.2d 1096 (Fla. 5th DCA 2007). The Fifth DCA found Petitioner had invoked its trade secret privileges even though the discovery request in that case was to the State, and not to Petitioner, and Petitioner never had any correspondence or involvement in *Moe* asserting any trade secret privilege.

Petitioner could not then have been in contempt of the subpoenas because it properly objected in writing to the attorney of record, quashed the subpoenas, and it asserted trade secret privilege. Petitioner could not then be in contempt for

failure to provide the source code at the production date, especially where all parties involved, including the lower court, knew the source code was a trade secret but failed to provide any protective measures whatsoever to protect the proprietary nature of Petitioner's protected information.

CONCLUSION

The County Court erred when it found the source code was material because the Florida Legislature intended to preclude criminal defendants from obtaining it from both the State and the Petitioner when it amended the statute. Further, Florida courts do not have jurisdiction over out-of-state non-party witnesses through registered agents, because a court's subpoena power is limited to the borders of that state, in contrast to a court's long-arm jurisdiction which extends by statute to parties exerting minimum contacts within the state. Additionally, Petitioner should not have been held in willful contempt because it properly responded to the subpoenas at issue, quashed them in Kentucky, were told by both Sarasota and Kentucky courts they did not have to respond to the subpoenas, and were in fact ordered by another court not to respond. Finally, Petitioner should not be held in contempt for failure to respond to the subpoenas at issue because Petitioner asserted trade secret privilege and the County Court, despite its recognition that the source code is a trade secret, failed to request that Respondents

find the source code was reasonably necessary, and failed to institute the appropriate protective measures for that trade secret prior to its disclosure.

Accordingly, the County and Circuit Court Orders should be reversed.

DATED: April 30, 2008

Respectfully submitted,

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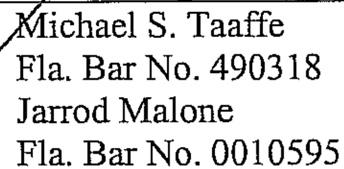
By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express to:

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this 30 day of April, 2008.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Initial Brief is submitted in Times New Roman 14-point font.

DATED: April 30, 2008

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